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IN THE

Supreme Court of the United States

October Term, 1950

No. 374

MARY LARSEN, Special Administratrix of the Estate of Wayne E. Sanders, Deceased, Petitioner,

vs.

HONORABLE CARROL O. SWITZER, Judge of the United States District Court Within and for the Southern District of Iowa, Davenport Division, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner seeks certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in *Larsen v. Switzer,* 183 F. (2d) 850, which denied her application for a writ of mandamus directing respondent to vacate his order denying and to grant the motion of the plaintiff (petitioner) under Rule 41 (a) (2), Federal Rules of Civil Procedure, to dismiss, without prejudice, an action pending in the United States District Court, Southern District of Iowa, Davenport Division.

The action, brought against Chicago and North Western Railway Company under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's decedent, was started in the United States District Court, District of Minnesota, Fourth Division, and later transferred to the Southern District of Iowa, Davenport Division, "for the convenience of parties and witnesses, in the interest of justice," on motion of the Railway Company under Section 1404 (a), Judicial Code (28 U. S. C. A., Sec. 1404 (a)). Petitioner's motion to dismiss the action without prejudice was made after service of the defendant's answer (R. pp. 2-6, *Larsen v. Nordbye,* 181 F. (2d) 765, C. C. A. 8).

REASONS URGED IN SUPPORT OF PETITION NOT TENABLE

Reasons Urged.

Petitioner contends that this court should grant certiorari and review the decision of the Court of Appeals for the reasons that such decision is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Bolten v. General Motors Corp.,* 180 F. (2d) 379, and with this court's decision in *In re Skinner & Eddy Corporation,* 265 U. S. 86.

Decision Sought to Be Reviewed.

In *Larsen v. Switzer,* 183 F. (2d) 850, the Court of Appeals for the Eighth Circuit decided *one* question. It held that it could review the ruling of the trial court on a motion under Rule 41 (a) (2) to dismiss an action, without prejudice, *only* on appeal from a final order or judgment and not through the medium of a writ of mandamus. The Court of Appeals did not pass on the correctness of the

ruling on the motion to dismiss nor whether respondent abused a judicial discretion in declining to dismiss the action.

No Conflict between Circuit Courts of Appeal on the Same Matter or Issue.

Bolten v. General Motors Corp., 180 F. (2d) 379 (C. C. A. 7), involved an appeal from a final judgment. The trial court had denied the plaintiff's motion to dismiss, without prejudice, and granted the defendant's motion for summary judgment. The Court of Appeals reversed the judgment, holding, that under the circumstances there present, it was error to overrule the motion to dismiss and that the trial court should have allowed a dismissal without prejudice upon appropriate terms and conditions.

Whether mandamus is a proper remedy to secure a review of an order denying or granting a motion to dismiss, without prejudice, under Rule 41 (a) (2), was not at issue nor decided in the *Bolten* case. Hence, there is no conflict on the same matter between the decision here sought to be reviewed and the decision in the *Bolten* case. Later it will be made apparent that the *Bolten* decision *obiter dicta* views respecting trial court discretion in ruling on a motion to dismiss are erroneous.

No Conflict With Skinner & Eddy Corporation Decision.

Ex parte Skinner & Eddy Corporation, 265 U. S. 86, was decided before the adoption of the Federal Rules of Civil Procedure. In that case a writ of mandamus properly issued to prevent the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. In the instant case the trial court possessed and exercised jurisdiction to rule on the motion of the plaintiff (petitioner), under Rule 41 (a) (2), to dismiss the action without prejudice. The distinctions which avoid any conflict between the decision in *Ex parte Skinner & Eddy Corporation* and the decision in *Larsen v. Switzer,* 183 F. (2d) 850 (C. C. A. 8) are pointed out in *Federal Savings & Loan Ins. Corporation v. Reeves,* 148 F. (2d) 731, 732 (C. C. A. 8).

Judicial Discretion of Respondent May Not Be Controlled or Reviewed by Mandamus.

The traditional use of the writ of mandamus is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Association,* 319 U. S. 21, 28-32. Here it must be conceded that the trial court had jurisdiction to rule on a motion to dismiss under Rule 41 (a) (2) and that such jurisdiction was exercised upon motion of the plaintiff. Therefore a writ of mandamus is not necessary either to confine the trial court to a lawful exercise of its jurisdiction or to compel it to exercise jurisdiction.

A statutory mode of appeal has been prescribed and is available to petitioner once an appealable order or judgment is entered in the case. (28 U. S. C. A., Secs. 1291 and

2107, Rule 73, Federal Rules of Civil Procedure.) Compare *Ex parte Whitney,* 13 Peters 404, 408; *Ex parte Loring,* 94 U. S. 418, and *Ex parte Perry,* 102 U. S. 183, 186, holding that mandamus may not be substituted for an appeal to correct an order made by a judge in the exercise of his authorized jurisdiction.

In *Federal Savings & Loan Ins. Corporation v. Reeves,* 148 F. (2d) 731, 732, the plaintiff applied to the Court of Appeals for the Eighth Circuit for a writ of mandamus directing the trial court to vacate an order denying its motion to dismiss, without prejudice, and to enter an order granting such motion. In holding that the trial court exercises a judicial discretion in ruling on a motion to dismiss under Rule 41 (a) (2) and that such discretion cannot be controlled by mandamus, the appellate court stated:

> "It is elementary that mandamus cannot be used to control the lawful discretion of a trial court * * *; nor to compel a trial court to reverse a decision which it has rendered on a question within its jurisdiction. * * * The writ may not be employed as a substitute for appeal. It is properly denied where the remedy by appeal is available, as it is here, in the event of a final judgment against petitioner in the District Court."

The *Reeves* decision is well reasoned and logical and disposes of *Ex parte Skinner & Eddy Corporation,* 265 U. S. 86, as a controlling precedent, in this language:

> "Ex parte Skinner & Eddy Corporation was decided before the adoption of the Federal Rules of Civil Procedure and at a time when a plaintiff had the absolute right to dismiss without prejudice upon the payment of the accrued costs, and, hence is not controlling here. The real ground for the issue of the writ in that case was to prevent 'the Court of Claims from exercising jurisdiction contrary to statute, over a suit which it had previously dismissed.' "

The Court of Appeals for the Eighth Circuit has held consistently that a trial court exercises a judicial discretion in ruling on a motion to dismiss an action, without prejudice, under Rule 41 (a) (2). *International Shoe Co. v. Cool,* 154 F. (2d) 778 (cert. denied 329 U. S. 726); *Sound Investment & Realty Co. v. Harper,* 178 F. (2d) 274; *Larsen v. Nordbye,* 181 F. (2d) 765, and *New York C. & St. L. R. Co. v. Vardaman,* 181 F. (2d) 769.

By analogy the decision in *Cone v. West Virginia Pulp & Paper Co.,* 330 U. S. 212, 217, 218, is persuasive. There this court directly construed Rule 50 (b), Federal Rules of Civil Procedure, to the effect that in ruling on a motion for judgment notwithstanding a verdict, a trial court, in its discretion, may grant the motion, order a new trial or *on motion allow a dismissal without prejudice.* This quotation from the *Cone* decision is interesting and pertinent:

> "Rule 41 (a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And *after* the *filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'* * * * In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, *or at least asked the court for permission to dismiss.* If satisfied from the knowledge acquired from the trial and because of the reasons urged that the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge *in order that he might exercise his discretionary power to determine whether there should be* a judgment, *a dismissal* or a new trial." (Italics supplied.)

Respondent was the judicial officer to whose judgment and discretion the law had entrusted the question whether the motion to dismiss, without prejudice, should be granted and, if so, on what terms and conditions. The Court of Appeals for the Eighth Circuit correctly held that it had no power by writ of mandamus to direct the respondent how and in whose favor the motion should be decided. Such action would result in the unwarranted substitution of the judgment and discretion of the appellate court for that of the judicial officer (the respondent) to whom the law had entrusted the decision of the issue. For similar reasons the appellate court, under its discretionary power to issue writs of mandamus, had no authority to compel respondent to reverse a decision already rendered, to correct an erroneous conclusion or to render another and different decision. *Larsen v. Nordbye,* 181 F. (2d) 765, 766 (C. C. A. 8). Even where permissible, resort to the extraordinary remedy of mandamus is discretionary. *Roche v. Evaporated Milk Association,* 319 U. S. 21.

Bolten Decision Respecting Trial Court Discretion Dictum and Incorrect Statement of Law.

Although not necessary to the decision in the case and in fact contrary to the doctrine of the cases cited to support the statement (*Home Owners Loan Corporation v. Huffman,* 134 F. (2d) 314 (C. C. A. 8); *Hydraulic Press Mfg. Co. v. Williams, White & Co.,* 165 F. (2d) 489 (C. C. A. 7), and *Peardon v. Chapman,* 169 F. (2d) 909 (C. C. A. 3)) in the *Bolten* decision (180 F. (2d) 379, 381, 382), the Court of Appeals for the Seventh Circuit, expressed the view that unless, in the course of the proceedings, a defendant "has acquired such legal rights * * * that it could not be adequately protected by any 'terms and conditions'

which the court might impose as a prerequisite" to dismissal, the plaintiff, even after answer, has an absolute right to dismiss the suit without prejudice, the trial court's discretion in ruling on a motion under Rule 41 (a) (2) being limited to fixing "terms and conditions," such as payment of costs.

In the *Huffman, Hydraulic Press* and *Peardon* cases the error specified was raised by an appeal from a final judgment and none of the decisions support the contention that, in ruling on a motion under Rule 41 (a) (2), trial court discretion is limited to the imposition of "terms and conditions," such as a requirement for payment of costs. For example, in the *Huffman decision* (134 F. (2d) 314, 318, 319), the Court of Appeals for the Eighth Circuit states:

> "Under Rule 41 a plaintiff does not have an absolute right to dismiss his case without prejudice after an answer has been served."

In the *Hydraulic Press* case (165 F. (2d) 489, 495) the judgment appealed from dismissed certain counts of the complaint *with prejudice* contrary to plaintiff's motion that they be dismissed *without prejudice.* In sustaining the judgment, the Court of Appeals for the Seventh Circuit used this language:

> "The effect of this rule (41 (a) (2)) was to confer upon the court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice 'such terms and conditions as the court deems proper.' * * * We think it was a matter of discretion. We cannot say the court abused its discretion."

If in ruling on a motion to dismiss *without prejudice* a trial court has discretion to require, as a condition to dismissal, that it be *with prejudice,* then certainly it has discretion to determine whether, under all of the circum-

stances, it would be equitable and proper to grant the motion.

In the *Peardon* case (169 F. (2d) 909, 913) the Court of Appeals for the Third Circuit held that in ruling on a motion, under Rule 41 (b), to dismiss an action for lack of prosecution, the trial court exercises a judicial discretion and "* * * the action of a trial judge in such circumstances is therefore reversible only when an abuse of discretion is shown."

It is evident that the *obiter dicta* views of the Court of Appeals for the Seventh Circuit in the *Bolten* decision were not justified by the authorities cited and are contrary to well reasoned authorities, including, by analogy, the decision of this court in *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212. Further, if it be assumed, as is suggested in the *Bolten* decision, that in ruling on a motion to dismiss, without prejudice, under Rule 41 (a) (2), trial court discretion is confined to a determination of the legal rights acquired in the proceeding by the defendant and whether such rights can be adequately protected by "terms and conditions" and of the appropriate terms and conditions that should be imposed as a prerequisite to dismissal without prejudice, then from a consideration of the authorities cited and discussed, it is clear that the exercise of even such limited discretion may not be controlled or reviewed by mandamus.

CONCLUSION

The petition for a writ of certiorari should be denied. The Court of Appeals decision is correct. There is no conflict on the same matter between United States Courts of Appeals or between the decision of the Court of Appeals for the Eighth Circuit sought to be reviewed and the decision of this court in *Ex parte Skinner & Eddy Corporation,* supra.

Respectfully submitted,

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